Supreme Court, U. S.
FILED
NOV 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-708

JOHN McGRATH,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

JOHN McGRATH,

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, John McGrath, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Supreme Court entered on July 19, 1977.

OPINION BELOW

The Court of Appeals opinion is reported in 558 F.2d 1102, and a copy of the opinion is annexed hereto in Appendix A.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on July 19, 1977. A timely petition for rehearing or rehearing en banc was denied on October 13, 1977 without opinion. See Appendix B. Jurisdiction in this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

(1) Was petitioner denied his constitutional right of confrontation, due process of law, and a fair trial by the admission of hearsay evidence which advised the jury that petitioner was willing to accept a $10,000 bribe from one James Foley, despite the fact that petitioner never knew Foley, never knew of such bribe offer, and was not charged with any such bribe offer?

(2) Was petitioner denied his constitutional right to be tried upon the original indictment

returned by the Grand Jury, to a fair trial, and against double jeopardy, when, during the course of the trial, the Government procured a second indictment amending the description of petitioner's public office which he was alleged to have wrongfully used to extort money?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions involved are the indictment, due process and double jeopardy clauses of the Fifth Amendment to the United States Constitution; the impartial jury, the accusation and confrontation clauses of the Sixth Amendment to the United States Constitution. Also involved is Federal Rule of Evidence 801(d)(1)(b). These provisions are annexed hereto as Appendix C.

STATEMENT OF THE CASE

Following a trial before a jury in the Eastern District of New York, petitioner was convicted of three violations of the Hobbs Act, 18 U.S.C. §1951; five counts of tax evasion, 26 U.S.C. §7201; and five counts of filing false and fraudulent tax returns, 26 U.S.C. §7206. He received concurrent sentences of a year and a day on the three Hobbs Act convictions. Also imposed was a fine of $5,000 and the assessment of costs for the prosecution in the sum of $8,662.75.

On appeal and in this petition, petitioner contends that he was denied his constitutional rights because of the admission of the highly prejudicial hearsay evidence which he could not defend, and the procurement of a second indictment during the course of the trial, which contained a significant change from

the original indictment which he was prepared to defend.

1. <u>The admission of hearsay evidence which advised the jury that petitioner was a corrupt public official willing to accept a $10,000 bribe</u>.

During the course of the trial, the Government called five tow-truck operators who testified that petitioner had allegedly extorted payments from them in order to operate on the Long Island parkways. At that time, petitioner was a parks maintenance supervisor of the Long Island State Parks Commission ("LISPC"). One of the tow-truck operators was Victor LaGuardia. Because LaGuardia had previously denied before the Grand Jury that he had made any extortionate payments to petitioner, he was vigorously cross-examined by petitioner's counsel. During the entire

cross and re-direct examination, however, not one question was asked or answered relating to one James Foley.

As soon as LaGuardia had been excused as a witness, the Government announced that it would call James Foley as the next witness. No allegations were contained in the indictment or the Government's bill of particulars relating to Foley. The prosecutor advised the Court that the Government intended to elicit through Foley a conversation wherein LaGuardia stated that in exchange for a $10,000 bribe for petitioner, Foley could obtain parkway employment. This conversation took place in a barroom sometime prior to the investigation and before LaGuardia's grand jury appearance. Petitioner was not present during the conversation, had no knowledge of it and was never approached concerning

the alleged bribe offer. Nor did petitioner know or meet Foley.

The trial judge accepted the Government's contention that such evidence was admissible as a prior consistent statement of LaGuardia offered to rebut a charge of recent fabrication under Federal Rule of Evidence 801(d)(1)(b). Foley's testimony was admitted over petitioner's strenuous objection.

Twice during its summation, the Government relied upon the Foley hearsay evidence in urging the jury to convict petitioner. The prosecutor presented Foley's testimony as unimpeachable evidence which substantiated the testimony of LaGuardia and the other tow-truck operators. Relying on Foley's testimony, the prosecutor told the jury that the evidence showed, "...the way to get on the parkway is to pay McGrath."

The jury was unable to convict the petitioner until four days of deliberations had elapsed. Twice it confessed that it could not reach a verdict. On one occasion, the jury advised the trial judge: "Your Honor, we are in a deadlock concerning the extortion counts. May we please have further instructions as to what to do." Upon receiving further instructions, the jury resumed deliberations. But, on the following day, the jury sent another note to the trial judge: "We have concluded that we cannot reach unanimous decision on counts 11 through 15. (the extortion counts) Please instruct us, your Honor, as to the other counts." Before the Court issued further instructions, the jury was sent home for the weekend. Upon their return, the Court, over petitioner's objection, gave the jury an Allen-type charge.

At the conclusion of the day, the jury returned its verdict of guilty on all but two of the extortion counts.

2. The procurement of the second indictment during the course of the trial.

The original indictment returned against petitioner charged that he had extorted payments from the two-truck operators, when he had served as a parks maintenance supervisor for the Long Island State Parks and Recreation Commission ("LISPRC"). The indictment alleged that by virtue of the powers of the Commission and his position in relation thereto, petitioner had the power to adversely affect their doing business on the Long Island State parkways, and that petitioner had wrongfully used this power to extort payments "under color of official right" from the tow-truck operators. These allegations were

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essential to prove "extortion" as defined under the Hobbs Act, 18 U.S.C. §1951(a)(2).

During the opening statement, the Government alleged that petitioner had the power as a supervisor of the LISPRC to adversely affect the tow-truck operators' ability to do business on the parkways, and wrongfully used that power to extort payments from them.

Following opening statements, petitioner's counsel moved to dismiss the extortion counts upon the ground that the Government could not, as a matter of law, prove its essential allegation since the LISPRC did not come into existence until September 1, 1972. For the years 1968 through 1972, petitioner had been employed by the LISPC which was dissolved by operation of law upon creation of the LISPRC. The trial judge adjourned the trial for the weekend in order to permit the Government to

prepare a memorandum of law concerning the defendant's motion before the trial would resume.

During the adjourned period, the Government reconvened the grand jury which had filed the original indictment. The grand Jury returned a second indictment, alleging that petitioner had been employed by the LISPC prior to September 1972. Over petitioner's objection, the Court accepted the filing of the second indictment.

During the entire trial, the jury was never advised that the grand jury had been reconvened and that a second indictment had been returned changing the allegation regarding petitioner's employment for the period prior to September 1972.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals holding that the admission of the Foley hearsay evidence is authorized by the Federal Rules of Evidence constitutes an unprecedented and inimical departure from the traditional rules of evidence which should be reviewed by this Court as a violation of petitioner's right to a fair trial, to confront witnesses and to due process of law.

Petitioner respectfully submits that the Court of Appeals holding endorsing the admission of the Foley hearsay evidence is unsupported by the Federal Rules of Evidence and the cases cited in the Court's opinion justifying admission of such evidence, and presents a violation of constitutional rights warranting review by this Court

Federal Rule of Evidence 801(d)(1)(b) permits evidence of prior consistent statements to be

offered only on condition that they are offered to rebut a charge of recent fabrication levelled against a prosecution witness concerning matters to which he has testified at trial. This minimal requirement was not met in petitioner's case. The element of recent fabrication in this case could only be based upon the cross-examination of LaGuardia. Petitioner's counsel properly developed for the jury's consideration the fact that he had previously denied under oath that he had paid petitioner monies. The limit for offering rebuttal evidence concerning LaGuardia's testimony was necessarily confined to LaGuardia's varying versions concerning the alleged extortionate payments to petitioner.

There was, therefore, no reason or basis upon which to invoke this rule for the admission of evidence relating to one James

Foley because the alleged Foley bribe offer was not a subject of LaGuardia's testimony at trial, and constituted highly prejudicial evidence.

The Court of Appeals opinion rested its holding on three prior cases which allowed the admission of evidence of prior consistent statements (UNITED STATES v. LOMBARDI, 550 F.2d 827 (2d Cir. 1977); UNITED STATES v. ZITO, 467 F.2d 1401, 1404 (2d Cir. 1972); and UNITED STATES v. IACONETTI, 406 F.Supp. 554, 558 (E.D.N.Y.) (Weinstein, J.), aff'd. on other grounds, 540 F.2d 574 (2d Cir. 1976), cert. denied, ____ U.S. ____, 97 S.Ct. 739 (Jan. 10, 1977)). An analysis of each one of these cases, however, reveals that in each case, a proper foundation had been laid for the invocation of Federal Rule of Evidence 801(d)(1)(b). The "rebuttal" evidence

related directly to the transactions which were the subject of the prosecution witness' testimony at trial. In petitioner's case, however, no such foundation had been established.

To endorse the Court of Appeals holding will create a dangerous precedent to be relied upon in future Federal criminal trials. Under this holding, defendants can be confronted with highly incriminating evidence which they cannot defend. Petitioner was neither present nor had any knowledge of the Foley conversation. All of the recognized dangers of hearsay are present in this case and are unprotected by the Court of Appeals holding. LaGuardia's statement that petitioner would be willing to accept a $10,000 bribe could have been part of a fraudulent scheme by LaGuardia to obtain money from

Foley. It could likewise have been said in jest or as a joke. Nor was there any reliable record to establish that, in fact, LaGuardia had made such statement to Foley.

The Court of Appeals opinion itself manifests some doubt concerning the correctness of its holding when it states that, in any event, the admission of such evidence must be considered "harmless" or "negligible". Petitioner submits that application of the harmless error doctrine herein was inappropriate in view of the lengthy and difficult deliberations the jury had encountered before reaching a verdict. How can it be said with any degree of certainty that any one or more of the 12 jurors did not change their vote to guilty without considering or relying upon the Foley testimony? Foley's testimony branded petitioner as a known corrupt public official.

The Government considered the Foley testimony highly significant in arguing to the jury as shown by its summation. The fact that the jury had acquitted petitioner on the LaGuardia count should provide no support for the Court of Appeals finding because LaGuardia had been shown to be a self-confessed perjurer. The jury could still have been influenced by the Foley evidence, because he was the sole witness, as the Government argued, who had no reason or motive to falsely implicate petitioner. The Court of Appeals conclusion that the jury was uninfluenced by the Foley evidence is, in our view, an overextension of the harmless error doctrine. See HARRINGTON v. CALIFORNIA, 395 U.S. 250, 254 (1969).

For all of these reasons, we submit that the admission of the Foley hearsay evidence was clearly erroneous, and that petitioner's case warrants a review by this Court.

2. <u>The procurement of a second indictment during the course of a trial to correct a fatal defect in the original indictment should be reviewed by this Court because it constitutes unprecedented Governmental action which deprived petitioner of his constitutional right to be tried upon the original indictment, to a fair trial and against double jeopardy</u>.

A reading of the Court of Appeals opinion and all the cases relied upon therein reveals that no Court has been confronted with the question of whether the Government is able, during the course of a trial, to obtain a second indictment for the sole purpose of correcting a defective original indictment. All of the cases relied upon by the Court of Appeals are addressed to the power of the trial judge to

grant a motion to amend an allegation contained in the indictment. Those cases stand for the well-recognized proposition that an indictment may be amended to correct a matter of form and not substance. The Court of Appeals found that the change of petitioner's employing agency was a matter of form and not substance.

Petitioner submits that the change sought by the second indictment was not a matter of form but of substance; and that the Courts should not permit the procurement of a second indictment during the course of a trial in order to protect a defendant's right to be tried upon the original indictment.

The record reveals that petitioner was prepared to defend the original indictment upon the ground that during a major part of the time alleged in the indictment, he was not

a supervisor of the LISPRC because of its non-existence and that the LISPRC was powerless to award contracts to tow-truck operators. These contentions were addressed to the gravamen of the indictment.

To change an allegation necessary to prove an essential element of the Government's case cannot be considered a mere change of form and not substance. We believe our view is supported by the Government's extraordinary action in reconvening the grand jury and procuring a second indictment to overcome this defective allegation. This would not be necessary, as the Court of Appeals opinion recognizes, if the change was simply a matter of form for the trial judge would have the power to amend.

We submit that petitioner's case warrants review because of the unsettled state of the

law. At least two Courts of Appeals have stated that there is a state of confusion in the law concerning the amendment of indictments (UNITED STATES v. CIRAMI, 510 F.2d 69, 72 (2d Cir.), cert. denied, 421 U.S. 964, 95 S.Ct. 1952 (1975) and HEISLER v. UNITED STATES, 394 F.2d 692, 695-696 (9th Cir.), cert. denied, 393 U.S. 986, 89 S.Ct. 463 (1968)). As shown by the record in this case, had the limits under which an indictment could be amended been defined with certainty, petitioner would not have been placed in a position where the Government could later charge that his failure to raise an objection to the indictment prior to trial constituted a complete waiver. It would seem to be a reasonable requirement to expect the Government, during its investigation and presentation to the grand jury, to have precisely ascertained the identity of agencies involved and the scope

of their powers where it asks the grand jury to charge that a defendant wrongfully used his official powers to extort money. The Courts should not be confronted with repeated cases where indictments are defective through no fault of the Court or the defendant, but solely through the fault of the Government. This case, we respectfully submit, affords this Court a rare opportunity to construe the constitutional limitations upon which an indictment can be amended and such review will serve the efficient administration of Federal criminal justice.

This Court found that the prosecution proceeds at its peril where its witnesses are not prepared to testify after the jury had been sworn. See DOWNUM v. UNITED STATES, 372 U.S. 734, 83 S.Ct. 1033 (1963). A defendant is entitled to a dismissal with prejudice if

the prosecution is unable to proceed with the trial under those circumstances.

We can perceive no sound reason for the Courts to permit the Government to reconvene a grand jury and obtain a second indictment after a jury has been sworn simply because it ran the risk of dismissal or acquittal due to a defective allegation in the original indictment. The grand jury should not be used to bail out the prosecutor's negligence. It is the Government's sole burden to properly prepare and proceed with the trial.

In petitioner's case, the defective allegation was solely attributable to the Government's conduct. Petitioner was prepared to defend upon this defective allegation. In our view, the prosecution proceeded at its own peril, and this Court should review petitioner's case for the foregoing reasons.

CONCLUSION

The Petition Should Be Granted.

Respectfully submitted,

LEONARD J. MEISELMAN
Attorney for Petitioner

APPENDIX A

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1282—September Term, 1976.

(Argued May 13, 1977 Decided July 19, 1977.)

Docket No. 77-1064

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN McGRATH,

Defendant-Appellant.

Before:

CLARK, *Associate Justice,**
LUMBARD and MESKILL, *Circuit Judges.*

Appeal from judgments of conviction in the United States District Court for the Eastern District of New York, Henry Bramwell, *J.* Appellant was convicted of three violations of the Hobbs Act, 18 U.S.C. § 1951; five counts of tax evasion, 26 U.S.C. § 7201; and five counts of filing false and fraudulent tax returns, 26 U.S.C. § 7206. On appeal, he objects to the indictment, the failure to grant a severance and a number of evidentiary rulings.

Affirmed.

* Mr. Justice Clark died on June 12, 1977, before this case could be decided. The appeal is being decided, pursuant to 2d Cir. R. § 0.14, by Judges Lumbard and Meskill, who are in agreement.

LEONARD J. MEISELMAN, Mineola, New York (John J. Reilly, Meiselman, Boland, Reilly & Pittoni, Mineola, New York, of counsel), *for Appellant.*

STANLEY A. TEITLER, Assistant United States Attorney for the Eastern District of New York (David G. Trager, United States Attorney, Bernard J. Fried, Stanley Marcus, Assistant United States Attorneys, Eastern District of New York, of counsel), *for Appellee.*

MESKILL, *Circuit Judge:*

After a trial in the Eastern District of New York, before Judge Bramwell and a jury, appellant was convicted of three violations of the Hobbs Act, 18 U.S.C. § 1951, five counts of tax evasion, 26 U.S.C. § 7201, and five counts of filing false tax returns, 26 U.S.C. § 7206. He received concurrent sentences of a year and a day on the three Hobbs Act convictions. Judge Bramwell also imposed a fine of $5,000, and assessed McGrath the costs of the prosecution, $8,662.75. On this appeal, McGrath challenges the sufficiency of the indictment, the joinder of offenses and a number of Judge Bramwell's evidentiary rulings.

We affirm.

The Facts.

From the mid-1950s until his retirement in 1974, John McGrath was the Park Maintenance Supervisor of the Long Island State Park Commission, an agency of the State of New York. The Commission exercises jurisdiction over the state parks located on Long Island, as well

as the Southern State Parkway, a major east-west highway on Long Island.[1]

As part of his official duties, McGrath awarded contracts to tow truck operators to remove disabled cars from the Southern State Parkway. The indictment charged McGrath with extorting illegal payments from five tow truck operators in return for parkway towing contracts, in violation of the Hobbs Act.[2]

McGrath did not report the income he received from his extortionate venture, thereby providing a basis for charges of tax evasion and filing false and fraudulent returns. In addition, the government proved that McGrath failed to report interest income on several bank accounts, capital gains and mortgage payments received from a purchase money mortgage on the sale of a house, as well as rental income from two houses on Fire Island. After McGrath was informed that he was the subject of an investigation by the Internal Revenue Service, but before indictment, he filed "amended" tax returns for every year from 1969 to 1973. These showed the income from his real estate investments and bank accounts, but not the proceeds of his extortion. The jury convicted him on the tax evasion and false filing counts and on three extortion counts. McGrath was acquitted on the remaining two extortion counts.

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1 The powers and duties of the Long Island State Parks and Recreation Commission are set out in N. Y. Parks & Rec. Law § 7.01 *et seq.* (McKinney 1976). The Commissioners also serve as the board of the Jones Beach State Parkway Authority, N. Y. Pub. Auth. Law § 152 (McKinney 1970), which in turn controls the Southern State Parkway.

2 18 U.S.C. § 1951(a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

The Indictment.

The indictment, as originally filed, charged McGrath with extorting payments in his capacity as an employee of the "Long Island State Parks and Recreation Commission." Since 1972, that has been the official name of McGrath's employer. Before that time, it was officially known as the "Long Island State Park Commission." There is no dispute that McGrath's duties and authority were the same before and after the change in official titles.

After the jury was empanelled and both sides made opening statements, McGrath moved to dismiss the indictment because of the variation in the names of the Commission. Judge Bramwell then adjourned the trial. During the adjournment, the government reconvened the Grand Jury, which amended the indictment to show the correct official names of the Commission. The trial was then resumed. The major thrust of McGrath's appeal is his contention that the Grand Jury was powerless to make the change.

Innumerable cases have allowed amendment by the Court or the prosecutor without Grand Jury action, under circumstances similar to those of the instant case. *See, e.g., United States* v. *Cirami*, 510 F.2d 69 (2d Cir.), *cert. denied*, 421 U.S. 964 (1975) (appellants, rather than corporation of which they were officers, stated to owe tax); *Heisler* v. *United States*, 394 F.2d 692 (9th Cir.), *cert. denied*, 393 U.S. 986 (1968); *Dye* v. *Sacks*, 279 F.2d 834 (6th Cir. 1960) (misdescription of robbery victim's name); *Williams* v. *United States*, 179 F.2d 656 (5th Cir. 1950), *aff'd*, 341 U.S. 97 (1951) (misnamed co-defendant and employer for which crime was committed); *United States* v. *Denny*, 165 F.2d 668 (7th Cir. 1947), *cert. denied*, 333 U.S. 844 (1948) (name of defendant misspelled); *Del Piano* v. *United States*, 240 F.Supp. 687 (E.D. Pa. 1965) (indictment charged robbery of bank insured by FDIC, which was

actually insured by FSLIC), *rev'd on other grounds*, 362 F.2d 931 (3d Cir. 1966). *See also United States* v. *Dawson*, 516 F.2d 796, 800-804 (9th Cir.), *cert. denied*, 428 U.S. 845 (1975).

Inasmuch as a ministerial change of this nature can be made by the court or the prosecutor, it can certainly be made by the Grand Jury, as was done here.[3] C. Wright, 1 Federal Practice and Procedure § 127 (1969). McGrath suffered no prejudice from the misnomer. The original indictment fully informed him of the crime charged and the need to prepare a defense, and it would have enabled another court to determine the charge for double jeopardy purposes. When the indictment was amended, none of his rights was affected by the change, and the burden of his defense was not increased. We reject the appellant's invitation to return to the arid formalism of common law pleading. *See Williams* v. *United States*, 341 U.S. 97, 102-104 (1951).[4]

Moreover, McGrath's objection came too late. Fed. R. Crim. P. 12(b) provides, in relevant part:

> Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion.

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3 None of the cases cited by appellant supports his contention that an indictment may not be amended by the Grand Jury. Indeed, the cases upon which he relies imply that the Grand Jury may amend. *See Ex Parte Bain*, 121 U.S. 1, 8, 10 (1887); *Stirone* v. *United States*, 361 U.S. 212, 215-16 (1960); *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 571-72 (2d Cir. 1961). The principal justification for barring amendment by the court or prosecutor is the possibility that the Grand Jury might have voted no bill on the amended facts. When the amendment is made by the Grand Jury, this danger does not exist.

4 McGrath also complains that he was indicted and convicted for extorting money from "Russo Brothers Service Station, Inc." rather than "Russo Brothers Service Center, Inc.," its true name. Although no attempt was made by the government to correct the name, the appellant cannot show any prejudice from this trivial technicality.

> Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> (1) Defenses and objections based on defects in the institution of the prosecution; or
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings).

Despite the fact that his motion came within the clear language of the rule, McGrath insists that the variance is "jurisdictional," and thus could be raised at any point in the proceedings under Rule 12(b)(2).

The exception in that rule applies only to motions directed to subject matter jurisdiction. *Sewell* v. *United States*, 406 F.2d 1289, 1292 (8th Cir. 1969); 8 Moore's Federal Practice ¶ 12.03[1] (1976). There is no merit to the appellant's claim that this "defect" in the indictment is jurisdictional.[5] *United States* v. *Isaacs*, 493 F.2d 1124, 1141 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

Joinder.

McGrath made a timely motion under Fed. R. Crim. P. 14 to sever the tax counts from the Hobbs Act violations.

5 McGrath's argument proves far too much. It makes all objections to indictments jurisdictional, and thus would render Rule 12 a nullity.

Furthermore, it is clear that the indictment charges a violation of the Hobbs Act. Every element of the crime is spelled out in the indictment, which is undeniably sufficient on its face. Thus, the defect does not fall within the scope of the second exception of Rule 12(b)(2). *See United States* v. *Chestnut*, 533 F.2d 40 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3250 (U.S. Oct. 4, 1976).

McGrath claims that Judge Bramwell's denial of that motion constituted reversible error.

Multiple trials are unfair to both the government and the accused. A prosecution is expensive and time-consuming, for the government and the court. The defendant is put to the expense and embarrassment of two or more trials. Accordingly, Fed. R. Crim. P. 8 provides a liberal standard for joinder. In relevant part, the rule provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Judged by that standard, joinder of the tax evasion and Hobbs Act counts was proper.[6] *United States* v. *Roselli*, 432 F.2d 879, 900-902 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971). *See United States* v. *Isaacs*, 493 F.2d 1124, 1159 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (Travel Act). The same is true of the joinder of the false declaration and tax evasion counts. *United States* v. *Sweig*, 441 F.2d 114, 118 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971).

A motion for severance of properly joined offenses is addressed to the sound discretion of the trial judge.[7]

6 Because the tax counts each deal with a single year, it would have been impossible to split the tax counts into those related and unrelated to the Hobbs Act violations.

7 Severances are governed by Fed. R. Crim. P. 14, which provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defen-

McGrath is unable to point to any prejudice flowing from the single trial. Since the proof at separate trials would largely overlap, judicial economy was served by a single trial, with no sacrifice of appellant's rights. Judge Bramwell's decision not to grant the severance must be upheld.

Foley's Hearsay Testimony.

One of the tow truck operators allegedy victimized by McGrath was Victor LaGuardia. Before the Grand Jury, LaGuardia testified that he had no knowledge of McGrath's extortionate scheme. After this testimony, he was indicted for perjury. When called at trial, he testified that he had made extortionate payments from 1968 to 1973, and admitted to perjuring himself before the Grand Jury. Defense counsel then engaged in a vigorous cross-examination intended to show that LaGuardia's testimony was recently fabricated in order to gain leniency in his perjury prosecution.

In rebuttal, the government called a friend of La Guardia, Joseph Foley, who had managed a service station on the parkway. Foley had lost his job after a criminal conviction and was seeking parkway employment. He testified that LaGuardia told him that this could be arranged, but that a $10,000 bribe for McGrath was necessary. This conversation took place before LaGuardia's Grand Jury appearance. McGrath now claims that Foley's

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dants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

The advisory committee on the Rules made the following comment on Rule 14:

This rule is a restatement of existing law under which severance and other similar relief is entirely in the discretion of the court.

testimony was not relevant to any of the issues at trial, and was so prejudicial and inflammatory as to deny him a fair trial.

This testimony was admissible under Fed. R. Evid. 801 (d)(1)(B) as a prior consistent statement offered to rebut a charge of recent fabrication. *United States* v. *Lombardi*, 550 F.2d 827 (2d Cir. 1977); *United States* v. *Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972); *United States* v. *Iaconetti*, 406 F.Supp 554, 558 (E.D.N.Y.) (Weinstein, *J.*), *aff'd. on other grounds*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 45 U.S. L.W. 3463 (U.S. Jan. 10, 1977). Judge Bramwell clearly did not abuse the wide discretion given to trial judges in making evidentiary rulings. *See United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). If the evidentiary ruling was erroneous, it would be harmless in any event. The possibility that McGrath was damaged by this testimony is negligible. McGrath was acquitted on the Hobbs Act count involving LaGuardia. While there is always the possibility of a "spillover" effect on the jury in its consideration of other criminal counts, that does not appear to have occurred here. The jury acquitted on another Hobbs Act count as well, demonstrating an ability to evaluate the evidence count by count. Thus, we conclude, beyond a reasonable doubt, that there could have been no improper prejudice from the admission of Foley's testimony.

We have carefully considered appellant's other arguments, and find them unworthy of discussion. The judgments of conviction are affirmed.

APPENDIX B

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of October, one thousand nine hundred and seventy-seven.

Present: HON. TOM C. CLARK
Associate Justice

HON. J. EDWARD LUMBARD

HON. THOMAS J. MESKILL

Circuit Judges

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JOHN McGRATH,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, John McGrath,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

APPENDIX C

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

RULE 801 OF THE FEDERAL RULES OF EVIDENCE

The following definitions apply under this article:

(a) Statement. - A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. - A "declarant" is a person who makes a statement.

(c) Hearsay. - "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. - A statement is not hearsay if -

(1) Prior statement by witness. - The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury

at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(2) Admission by party-opponent. - The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

No. 71-[illegible]

In the Supreme Court of the United States

October Term, 1971

JOHN McGEATH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-708

JOHN McGRATH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his Hobbs Act, tax evasion and false return convictions on the grounds that hearsay evidence was improperly admitted against him and that the government should not have been permitted to try him upon an amended indictment that corrected the official title of the state agency by which he was employed.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of three violations of the Hobbs Act, 18 U.S.C. 1951, five counts of income tax evasion, in violation of 26 U.S.C. 7201, and five counts of filing false income tax returns, in violation of 26 U.S.C. 7206. The trial court sentenced him to concurrent sentences of a year and a day on the three Hobbs Act convictions and a fine of $5,000

with respect to the other charges, and assessed him with costs of prosecution amounting to $8,662.75 (Pet. App. 2a). The court of appeals unanimously affirmed (Pet. App. 1a-9a).

The evidence showed that from the mid-1950's until his retirement in 1974, petitioner was the Park Maintenance Supervisor of the Long Island State Park Commission, a New York State agency (Pet. App. 2a). As part of his official duties, petitioner awarded contracts to tow truck operators to remove disabled cars from the Southern State Parkway. The indictment charged petitioner with extorting illegal payments from tow truck operators in return for parkway towing contracts (Pet. App. 3a). Since petitioner did not report the proceeds of his extortions on his tax returns, he was also charged with tax evasion and filing fraudulent returns (Pet. App. 3a).

1. Petitioner contends (Pet. 12-17) that testimony of one of the witnesses should have been excluded as hearsay. The witness in question, LaGuardia, one of the tow truck operators allegedly victimized by petitioner in an extortion scheme, testified before the grand jury that he had no knowledge of that scheme. Later he was indicted for perjury. At trial, LaGuardia testified that he had made extortion payments and admitted that he had perjured himself before the grand jury. On cross-examination, petitioner sought to show that LaGuardia's testimony was recently fabricated in order to gain leniency in his perjury prosecution (Pet. App. 8a). In rebuttal, the government called Foley, who had managed a gas station on the Southern State Parkway, but whose employment had been terminated (Tr. 865-870). In 1972, subsequent to that termination, Foley and LaGuardia became friends, and on one occasion Foley told LaGuardia that he, Foley, was anxious to return to employment on the Parkway. LaGuardia replied, according to Foley, that he would

arrange a dinner with petitioner to "work something out," but that it would probably cost Foley $10,000 to resume his employment as manager of a gas station on the Parkway, and the payment had to be made to petitioner. The meeting never took place (Tr. 868-869).

The court of appeals correctly held (Pet. App. 9a) that this "testimony was admissible under Fed. R. Evid. 801(d)(1)(B) as a prior consistent statement offered to rebut a charge of recent fabrication." Since the defense had attempted to show that LaGuardia had a motive to lie and had therefore falsely implicated petitioner, Foley's testimony was properly received to show that *before* his agreement with the government LaGuardia had implicated petitioner in connection with highway payoffs. See *United States* v. *Lombardi*, 550 F. 2d 827, 828-829 (C.A. 2); *United States* v. *Zito*, 467 F. 2d 1401, 1404 (C.A. 2); *United States* v. *Dorfman*, 470 F. 2d 246, 248 (C.A. 2); *United States* v. *DiLorenzo*, 429 F. 2d 216, 220 (C.A. 2), certiorari denied, 402 U.S. 950; *United States* v. *Grunewald*, 233 F. 2d 556, 566 (C.A. 2), reversed on other grounds, 353 U.S. 391.

Petitioner seeks (Pet. 14-15) to distinguish *Lombardi* and *Zito* on the ground that the rebuttal evidence in those cases related directly to the transactions that were the subject of the prosecution witness's testimony at trial. Petitioner claims that the government must first lay such a "foundation" (Pet. 15) before prior consistent statements of this kind become admissible. But there is no such requirement, and petitioner cites no authority in support of his contention. While prior consistent statements will ordinarily relate directly to the same transaction, the only requirements are those contained in Rule 801(d)(1)(B), which provides that a prior consistent statement is not excludable under the hearsay rule if the

declarant "testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive" (Pet. App. 14a-15a). As the court of appeals held (Pet. App. 8a-9a), the requirements of Rule 801(d)(1)(B) were unquestionably met in this case. Moreover, petitioner did not suffer any harm from this evidence, as he was acquitted on the count involving LaGuardia (Pet. App. 9a).

2. Petitioner also argues (Pet. 18-23) that the grand jury's amendment of the indictment, at the government's request, denied him the right to be tried upon the original indictment, deprived him of a fair trial, and violated the Double Jeopardy Clause.

The pertinent facts are as follows: After the jury was empanelled at trial and both sides had made opening statements, petitioner moved to dismiss the indictment because of an error in the name of the Commission that had employed him. The court then adjourned the trial and the government immediately reconvened the grand jury, which amended the indictment to show the correct official name of the Commission. The trial was then resumed (Pet. App. 4a). The only difference between the original and amended indictments was that in the original indictment, petitioner's employer was alleged to be the Long Island State Parks and Recreation Commission, while the amended indictment referred to the Long Island State Park Commission, the name to which the agency had been changed in September 1972 (Pet. App. 4a).

As the court of appeals correctly pointed out, "[t]here is no dispute that [petitioner's] duties and authority were the same before and after the change in official titles" (Pet. App. 4a). Since the change in the indictment was plainly

only formal, it would not have been error for the district judge to amend the indictment without grand jury action. *United States* v. *Cirami*, 510 F. 2d 69 (C.A. 2), certiorari denied, 421 U.S. 964; *Heisler* v. *United States*, 394 F. 2d 692 (C.A. 9), certiorari denied, 393 U.S. 986; *Dye* v. *Sacks*, 279 F. 2d 834 (C.A. 6); *Williams* v. *United States*, 179 F. 2d 656 (C.A. 5), affirmed, 341 U.S. 97; *United States* v. *Denny*, 165 F. 2d 668 (C.A. 7), certiorari denied, 333 U.S. 844. It follows that there was no error in seeking and obtaining an amendment by the grand jury.

Finally, petitioner urges (Pet. 21-23) that the amendment of the indictment after the empanelling of the jury violated the Double Jeopardy Clause. There was in this case only one trial of petitioner, and therefore there can be no valid double jeopardy claim.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

DOJ-1978-01